BRIEF IN SUPPORT OF THE PETITION.

Statement.

Statements regarding the opinion of the court below, the jurisdiction of this Court, the questions presented, and the errors assigned will be found in the petition.

Argument.

I. *A court sitting without jury should find facts specially when requested and separate its findings of fact from its conclusions of law.*

II. *A decision by a court sitting without jury is not to be affirmed as a finding of fact supported by evidence when it was in truth a conclusion of law unsupported by evidence.*

It will be more convenient to consider these two points together in order to avoid repetition.

This case involves an important question of Federal practice. The District Court, against the objection of the petitioner, defendant below, refused to comply with Rule 52(a) of the Federal Rules of Civil Procedure, which requires finding of facts specially, and stating separately the court's conclusions of law thereon (R. 78). Instead, the judge under a local rule delegated his judicial duty to the attorney for the respondent, plaintiff below (see R. 79, 82, 84), who stated in a composite document, but in the language of a finding of fact, what appears clearly from the judge's opinion to have been a ruling of law. The Circuit Court of Appeals then decided our appeal on the ground that the District Court's finding of fact was conclusive.

The District Court selected the application date because, as it said, the evidence of the insured's true date of birth

was in conflict, and "the rights of the parties should be controlled by the date given in the policy. The insurance company knew, or should have known, the limits of the plaintiff's knowledge and want of education at the time of issuing the policy. It should have satisfied itself then as to the correct age" (R. 76). It is abundantly apparent from this, as well as from other parts of the memorandum opinion, that the court's selection of the application date was not a special finding of fact on evidence. The court expressly refused to pass on the disputed evidence, and adopted the application date as a consequence. While loosely this adoption might perhaps be called a finding, it was not a finding on evidence, but an ultimate conclusion. The use of language suitable to a finding of fact in the "Findings of Fact, Conclusion of Law and Journal Entry" prepared by counsel for the plaintiff and signed by the court* imports no more than this, although it does, perhaps, create an apparent ambiguity until resolved. It is because of the importance of avoiding just such ambiguity that Rule 52(a) requires the separation of special findings and ultimate conclusions.

See *Tulsa City Lines* v. *Mains* (C.C.A. 10), 107 F. (2d) 377, 382.

Cf. *Interstate Circuit, Inc.*, v. *United States*, 304 U.S. 55.

Mayo v. *Lake Highlands Canning Co.*, 309 U.S. 310.

The other purpose, of course, is so that the appellate court may readily know what part of the decision is a finding

*A practice condemned in *United States* v. *Forness* (C.C.A. 2), 125 F. (2d) 928, 942, because such "mechanical" adoption may mean that "findings made by the district court are not supported by the evidence and not substantially in accord with the opinion."

of fact not to be set aside unless clearly erroneous, and what parts are legal conclusions which may be reversed.

Campana Corp. v. *Harrison* (C.C.A. 7), 114 F. (2d) 400.
United States v. *Armature Rewinding Co.* (C.C.A. 8), 124 F. (2d) 589.

It is not always easy to distinguish a finding from a conclusion or ruling.

Cf. *Manning* v. *Gagne* (C.C.A. 1), 108 F. (2d) 718.

The fact that the court labels it a finding is not conclusive.

Bendix Home Appliances v. *Radio Accessories Co.* (C.C.A. 8), 129 F. (2d) 177.

It is a common occurrence to send a case back to the District Court for proper compliance with the rule.

Interstate Circuit, Inc., v. *United States*, 304 U.S. 55.
Mayo v. *Lake Highlands Canning Co.*, 309 U.S. 310.
Humphrey v. *Helgerson* (C.C.A. 8), 78 F. (2d) 484.
Siano v. *Helvering* (C.C.A. 3), 79 F. (2d) 444.
Fitzhugh v. *Smith* (C.C.A. 8), 97 F. (2d) 893, and cases cited.

Instead, the Circuit Court of Appeals in the instant case, although the non-compliance with Rule 52(a) was assigned as error (R. 99, pt. 5), affirmed the decision, saying,

"Inasmuch as there was substantial evidence . . . which supported the finding of fact of the District

Court, that finding, not being clearly erroneous, is binding on this appeal." (R. 115.)

The court made no mention of the fact that the District Court had overruled the defendant's motion for a separate finding of facts and a separate statement of conclusions (R. 78), but instead fell a victim of the very confusion which strict observance of Rule 52(a) is intended to prevent. Doubtless it was misled by the "Findings of Fact, Conclusions of Law and Journal Entry" prepared by counsel for the plaintiff—which document embodied the very errors anticipated by the Circuit Court of Appeals for the Second Circuit, in that it contained "findings" "not supported by the evidence and not substantially in accord with the opinion."

United States v. *Forness* (C.C.A. 2), 125 F. (2d) 928, 942.

We have already pointed out that the court's selection of December 15, 1878 as the date of the plaintiff's birth was because it was the application date "which the parties accepted when the policy was made. It is the opinion of the court that the rights of the parties should be controlled by the date given in the policy. The insurance company . . . should have satisfied itself then as to the correct age." (R. 76.) This selection was thus not a finding of fact, but a conclusion or ruling of law.* In reciting it in the document he prepared for the court's signature as a finding,

*As a ruling of law it was, of course, erroneous. Where the policy contains an age adjustment clause (R. 41) (an age adjustment clause was required by Ohio law—General Code, § 9420) the policy date cannot be controlling; *Metropolitan Life Ins. Co.* v. *Levy* (N.J.) 30 Atl. (2d) 571; particularly where, as here, the plaintiff came into court admitting that the date stated in the application was erroneous (R. 4, 15).

plaintiff's counsel clearly did not proceed "substantially in accord with the opinion."

Furthermore, there was no evidence in the record which would justify a finding of December 15, 1878 as the plaintiff's date of birth, as alleged in the first instance, not by the District Court, but by the Circuit Court of Appeals (R. 114, 115). The Circuit Court of Appeals stated that there was substantial evidence that the plaintiff "had not reached sixty years in age on July 1, 1938" in the testimony of the plaintiff and his elder brother (R. 114). But this testimony was that the plaintiff was born in December, 1879 (R. 15, 23, 31) and was *manifestly not believed by the court* when it selected December 15, 1878. How, then, could the Circuit Court of Appeals conclude (R. 114, 115) that the court's "finding" was supported by this "substantial evidence"? There was no other substantial evidence warranting December 15, 1878. The remaining evidence was as follows:

1. May 15, 1878	Naturalization records (R. 26)
2. December 21, 1877	Plaintiff's statement to U.S. Marshal (R. 29)
3. December 15, 1879	Disability claim (R. 52)
4. 1879-80	Certificate of admission of Alien (R. 56)
5. 1877-78	Marriage license (R. 59)
6. December 15, 1878*	Plaintiff's 1931 disability proof
7. 1876-77	Child's birth certificate (R. 63)
8. 1877-78	Child's birth certificate (R. 65)

*It is to be doubted whether this statement to the effect that the records of a California doctor showed December 15, 1878 amounted to even a scintilla of evidence in favor of the plaintiff, particularly after he had testified finally that his true birthdate was 1879.

9. 1876-77	Child's birth certificate (R. 67)
10. December 15, 1880	Plaintiff's sworn age statement submitted before trial (R. 72)

There remains the statement in the application itself, where the date December 15, 1878 appears. Even aside from the fact that this prior statement by the plaintiff was repudiated by him at the trial, it was not evidence in its own support.

Pence v. *United States*, 316 U.S. 332, 339.

Thus the District Court *could not* have found on evidence that the plaintiff was born on *December 15, 1878*. The date was contrary to the evidence of both parties. The court might have found he was "under sixty" on July 1, 1938, but it *did not* make such a finding. That was a conclusion from its arbitrary selection of the application date, though that date was rejected by both parties, as binding on them. The Circuit Court of Appeals, in holding that a ruling of law that the defendant was bound by the application date is to be affirmed as a "finding of fact" supported by "substantial evidence," not only erred in failing to distinguish between findings and conclusions, but overlooked the fact that *the evidence would not have justified such a finding of fact had the court chosen to believe it—which it had stated it did not.*

III. *The Circuit Court of Appeals disregarded the applicable state law in ruling that the burden was on the defendant to prove that the plaintiff had not brought himself within the insuring clause.*

The policy provided disability benefits "If . . . the Insured shall furnish to the Company due proof that, before

attaining the age of sixty, he has become totally disabled" (R. 45). The Circuit Court of Appeals held that

> "the burden of proof rested upon appellant (the defendant) to show appellee had attained the age of sixty before he became totally and permanently disabled." (R. 115.)

It relied upon Ohio cases placing the burden of proving fraud or breach of warranty upon an insurer alleging such defenses.

The question which party has the burden of proof is serious, and if not decided in accordance with the applicable law as established by the Supreme Court is settled ground for certiorari.

New York Life v. *Gamer,* 303 U.S. 161.

The question is substantial, not procedural.

Cities Service Oil Co. v. *Dunlap,* 308 U.S. 208.

Where a policy in an insuring clause requires certain facts to appear at the time liability is asserted, under settled Ohio decisions the burden of proving compliance is on the plaintiff.

Armstrong v. *Ins. Co.,* 4 Ohio App. 46 (plaintiff in accident policy must disprove disease).

John Hancock Mutual Life Ins. Co. v. *Hicks,* 43 Ohio App. 242, 183 N.E. 93 ("disease contracted after date hereof"—plaintiff has the burden).*

*That the *Hicks* case and not the court's principle applies is evidenced by the fact that the defendant is not "contesting" the policy, as pointed out in *Pekras* v. *Prudential Ins. Co.*, 10 N.E. (2d) 704, 705, discussing the *Hicks* case.

These cases are squarely in point. The Circuit Court of Appeals discussed remote and inapposite Ohio cases, but refused even upon the petition for rehearing to consider these cases.

Respectfully submitted,

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